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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE

UNITED STATES

_____ TERM, 1980

ORIGINAL COPY

No. 80-5179

WILLIE MAE JOHNSON,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Durham v. Wyrick, 545 F.2d 41 (8th Cir. 1976);

Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977);

Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973);

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Ward v. State, 451 S.W.2d 79 (Mo. 1970);

Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980).

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STATEMENT OF FACTS

Pursuant to Supreme Court Rule 34.2, respondent finds that appellant's Statement of Facts is accurate and has not omitted any material matters.

ARGUMENT

Petitioner was tried in January of 1977 of both first degree murder (felony murder) and robbery first degree (the predicate felony) of one Gladys Gregg. Thereafter, the jury acquitted petitiioner of the murder charge and failed to reach a verdict on the robbery charge. At that point, the trial judge declared a mistrial. In March of 1977, petitioner was tried again for the robbery of Gladys Gregg. She was convicted of robbery by the jury and was sentenced to ten years imprisonment.

Petitioner alleges that the jury's original acquittal on the felony murder charge resulted in the jury necessarily finding that she caused the victim's death as the result of robbing her. Consequently, petitioner concludes that the doctrine of Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), mandates reversal.

Respondent submits that, based on the instructions submitted by petitioner (see Appendices III and IV), the jury acquitted petitioner of the felony murder for one of two reasons. Either it found that the petitioner did not cause the death of the victim or that she did not do so in robbing the victim. In regard to the robbery charge, the jury was simply unable to reach a verdict. According to appellant, this court's per curiam opinion in Harris v. Oklahoma, supra, precluded her retrial on the robbery charge because the double jeopardy clause bars prosecution for the lesser crime after conviction of the greater one.

Respondent submits that Harris v. Oklahoma, supra, determined only that, when a person is convicted of a greater crime (murder), he cannot then be retried for a lesser included offense (robbery with firearms) without violating the constitutional guarantee against double jeopardy. Harris does not even purport to proscribe subsequent prosecution of an accused for the underlying felony (robbery) following the accused's acquittal of felony murder. This is especially true when, as here, prosecution for the underlying felony was attempted in the same proceeding as that of felony murder. See, Whalen v. United States, ___ U.S. ___, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The only reason for the retrial was due to the jury's inability to reach the verdict on the charge of robbery at the original proceeding.

It is a well settled proposition that retrial of a defendant, following a prior mistrial on the same charge due to the jury's inability to reach a verdict, does not constitute

double jeopardy unless the trial court abused its discretion in granting the mistrial. Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1891); Durham v. Wyrick, 545 F.2d 41, 43-44 (8th Cir. 1976); Ward v. State, 451 S.W.2d 79, 81-82 (Mo. 1970). See also, Illinois v. Somerville, 410 U.S. 458, 467-468, 93 S.Ct. 1066, 35 L.Ed.2d 425, 433-434 (1973), wherein the court expressed disdain at the practice of a trial court declaring a mistrial for the sole purpose of allowing a prosecutor to strengthen the state's case but recognized that the granting of a mistrial, following a jury's inability to reach a verdict, rested within the discretion of the trial court to be disturbed on appeal only in the event of abuse.

Furthermore, the case law consistently holds that a defendant is entitled to immunity from re-prosecution only if he can show that the mistrial was intentionally triggered by the state for the tactical purpose of strengthening its case. United States v. Sanford, et al., 429 U.S. 14, 97 S.Ct. 20, 50 L.Ed.2d 17 (1976); State v. Berry, 298 S.W.2d 429 (Mo. 1957); State v. Sales, 558 S.W.2d 302 (Mo.App., Spr. D. 1977). It is submitted that the state's retrial of appellant, after a prior mistrial for robbery and under the circumstances of this case, did not constitute a violation of appellant's constitutional guarantee against double jeopardy.

The question remains, however, as to the effect of the doctrine of collateral estoppel on petitioner's case. Respondent submits that it cannot be convincingly argued that the jury's acquittal of the murder charge impliedly acquitted appellant of the robbery as was the case in Ash v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1969). The feature distinguishing petitioner's case from Ash is the fact that, in petitioner's case, it cannot be said that

there was only a "single rationally conceivable issue in dispute before the jury." Id. 397 U.S. at 445. In light of the jury's inability to return a verdict on the robbery charge at petitioner's January, 1977, trial, respondent submits that the jury's acquittal of felony murder, during the same criminal proceeding, was manifestly, for a reason or an issue, not related to the robbery. If this were not the case, then quite clearly the jury would have returned with an acquittal on the robbery charge.

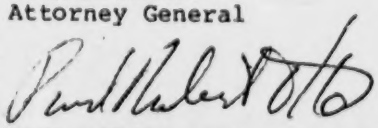
Petitioner grossly misconstrues the law in regard to double jeopardy. Although she is correct in alleging that each and every element of the crime of robbery was submitted to the jury at the first trial, in connection with the felony murder charge, she fails to understand that the jury's acquittal on felony murder did not preclude its consideration of the predicate felony alone as a substantive offense. Since the jury's acquittal on the felony murder could not have logically been predicated on its feeling that petitioner did not commit the robbery, the state was not collaterally estopped from submitting robbery to the jury or retrying on robbery after mistrial. The state was not precluded from retrying on the murder charge because the original mistrial, due to a hung jury, cannot be attributed to bad faith on the part of the prosecution.

CONCLUSION

WHEREFORE, respondent respectfully submits that the petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General



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May 13, 1980

Mr. Robert C. Babione
Public Defender
1320 Market Street
St. Louis, MO 63101

In re: State vs. Willie Mae Johnson - No. 61694

Dear Mr. Babione:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

Thomas F. Simon

Clerk.

cc: Attorney General